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No. 84-1586

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

EDWARD MALLEY AND
THE STATE OF RHODE ISLAND,
Petitioners,

vs.

JAMES R. BRIGGS AND LOUISA BRIGGS,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF OF THE STATE OF MINNESOTA, THE DISTRICT OF COLUMBIA, AND THE STATES OF ALABAMA, ARIZONA, CALIFORNIA, FLORIDA, GEORGIA, HAWAII, IDAHO, INDIANA, KANSAS, LOUISIANA, MICHIGAN, MISSISSIPPI, MISSOURI, MONTANA, NEBRASKA, NEVADA, NEW HAMPSHIRE, NEW JERSEY, NORTH CAROLINA, OHIO, OREGON, PENNSYLVANIA, SOUTH CAROLINA, TENNESSEE, UTAH, VIRGINIA, WISCONSIN, AND WYOMING AS AMICI CURIAE IN SUPPORT OF THE PETITIONERS

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STATEMENT OF INTEREST

The Amici States through their attorneys general, and the District of Columbia through its corporation counsel, respectfully offer this brief in support of the petitioners. This case raises issues of considerable public importance, the resolution of which will directly impact the amici.

First, amici have a significant responsibility to ensure the health, safety and welfare of their citizens through law enforcement activities. This responsibility is carried out through both the direct administration of law enforcement agencies and by providing guidance for the law enforcement agencies of other governmental units. Second, amici have, in varying degrees, responsibility for defending public officials subject to damage actions pursuant to 42 U.S.C. § 1983. Thus, amici are concerned with protecting public officials from monetary liability to the maximum extent provided by law.

Because of their interest in providing effective law enforcement and in protecting public officials from unwarranted liability, amici submit this brief in support of the petitioners.

SUMMARY OF ARGUMENT

The Court of Appeals' decision is inconsistent with this Court's principles regarding the functions of police officers and magistrates and with the policies underlying qualified immunity.

This Court has indicated that the responsibility for determining whether probable cause exists, and a warrant should therefore issue, rests with the neutral and detached magistrate issuing the warrant, not with the police officer seeking the warrant. *E.g., United States v. Leon,* 104 S. Ct. 3405 (1984). The Court of Appeals, however, has placed the burden of civil liability for an improper determination of probable cause on the police officer. The principles underlying this Court's decision in *Leon* and its antecedents suggest that the Court of Appeals' allocation of responsibility is erroneous.

Similarly, the policies underlying qualified immunity suggest that a police officer should be insulated from liability in the circumstances of this case. The social costs of excessive litigation prompted this Court to establish an objective standard for determining qualified immunity. *Harlow v. Fitzgerald,* 457 U.S. 800 (1982). The rule proposed by Rhode Island in the instant matter is a logical application of *Harlow* to the peculiar difficulties raised by fourth amendment analysis and application.

ARGUMENT

I. THE COURT OF APPEALS' DECISION IS INCONSISTENT WITH THIS COURT'S PRINCIPLES REGARDING THE FUNCTIONS OF POLICE OFFICERS AND MAGISTRATES.

This case presents the important and unresolved question of whether a police officer, who believes the facts in his affidavit to be true, and who submits the affidavit to a neutral and detached magistrate, can be held liable for damages under 42 U.S.C. § 1983 when it is subsequently determined that the facts recited in the affidavit did not constitute probable cause. The Court of Appeals for the First Circuit has approved liability in such circumstances. This ruling is inconsistent with this Court's principles regarding the functions of police officers and magistrates.

This Court has consistently recognized that police officers and magistrates perform different, though complementary, functions within the criminal justice system. As the Court stated in *Gerstein v. Pugh*, 420 U.S. 103 (1975):

> [T]he 'very heart of the Fourth Amendment directive' [is] a requirement that . . . a governmental search and seizure [or arrest] should represent both the efforts of the officer to gather evidence of wrongful acts and the judgment of the magistrate that the collected evidence is sufficient to justify invasion of a citizen's private premises or conversation.'

Id. at 113 n.12 (citation omitted). In other words, it is the function of the officer to conduct the investigation and present the information gathered to a magistrate, and it is the function of the magistrate to review that evidence and determine "in the first instance" whether probable cause exists.

United States v. Ross, 456 U.S. 798, 828 (1982) (Marshall, J., dissenting). *See also Illinois v. Gates*, 462 U.S. 213, 275 (1983) (Brennan, J., dissenting) ("a neutral and detached magistrate, and not the police should determine whether there is probable cause to support the issuance of a warrant").

This division of functions is of both practical and constitutional significance—it encourages vigorous and effective law enforcement while supporting the fourth amendment's preference for the warrant process. It accomplishes this by clarifying lines of responsibility and placing the probable cause determination in the most appropriate hands, those of the magistrate. Magistrates and judicial officers are independent, objective and trained in the law. In addition, a fundamental part of their duties is to keep abreast of the law and to engage in finely tuned legal analysis when necessary. The "police officer on the beat" cannot be expected to meet this standard. *United States v. Ross*, 456 U.S. at 827 (Marshall, J., dissenting). Rather, the probable cause determination should be made by an "independent arbiter", the magistrate. *Illinois v. Gates*, 462 U.S. at 275 (Brennan, J., dissenting).

The Court recently and firmly reiterated these principles in *United States v. Leon*, 104 S. Ct. 3405 (1984). There the Court again indicated that the responsibility for determining whether probable cause exists, and a warrant should therefore issue, rests with the neutral and detached magistrate issuing the warrant, not with the police officer seeking the warrant. 104 S. Ct. at 3420-21. In placing this responsibility with the magistrate, the Court recognized that "reasonable minds frequently may differ on the question whether a particular affidavit establishes probable cause" and the Court thus accorded " 'great deference' to a magistrate's determination." 104 S. Ct. at 3417. The Court reaffirmed the differing roles of police officers and magistrates, the former being

"engaged in the often competitive enterprise of ferreting out crime' and the latter providing "the detached scrutiny of a neutral magistrate, which is a more reliable safeguard against improper searches." 104 S. Ct. at 3416 (quoting *United States v. Chadwick*, 433 U.S. 1, 9 (1971)).

Despite the Court's consistent position that the responsibility for probable cause determinations rests with the magistrate or judge issuing the warrant, the First Circuit has placed the burden of civil liability for an improper determination of probable cause on the police officer requesting the warrant whenever the officer "should have known" that probable cause is lacking. *Briggs v. Malley*, 748 F.2d 715 (1st Cir. 1984). In so holding, the First Circuit relies largely on its perception of the dangers of making a magistrate "the sole protector of the fourth amendment," that is, the danger of encouraging "sloppy police work" and the danger that the magistrate will be ineffective in his scrutiny. 748 F.2d at 720.

However, as *Leon* suggests, it is questionable whether either of these anticipated dangers really exists. First, the proposition that placing responsibility on magistrates encourages sloppy police work assumes what the First Circuit makes explicit in its second conclusion, that magistrates are ineffective. This Court indicated that such an assumption cannot be made because "there exists no evidence suggesting that judges and magistrates are inclined to ignore or subvert the Fourth Amendment . . . ." 104 S. Ct. at 3418. Rather, the Court has recognized that "limiting the application of the exclusionary sanction may well increase the care with which magistrates scrutinize warrant applications." 104 S. Ct. at 3419, n.18. Moreover, magistrates are subject to district court supervision, which this Court has found to be an effective incentive for reasoned decision-making by magistrates. *Id.*

Second, the First Circuit apparently assumes that a magistrate's review must either completely insulate an officer or cannot insulate him at all. If such insulation were complete under all circumstances, amici might agree that there would be no deterrent to police misconduct and "sloppy police work" would result. However, the magistrate cannot insulate the officer where the officer either knew that the information in the affidavit was false or acted in reckless disregard of the truth. 104 S. Ct. at 3421-22 (citing *Franks v. Delaware*, 438 U.S. 154 (1978)). Thus, an ample deterrent remains to guard against officers' obtaining warrants in completely inappropriate situations.

The First Circuit's decision, when read with *Leon* and its antecedents, poses a difficult dilemma for law enforcement officers. For the purposes of a criminal proceeding, officers are encouraged to rely on a neutral and detached magistrate or judge for a determination of probable cause. However, if an officer engages in such reliance, he runs the risk of incurring civil liability under *Briggs v. Malley*, which places responsibility for determining probable cause back on the police. This result is inconsistent with the recognized division of functions between police officers and magistrates. A police officer, whose duty is to present evidence to the magistrate before proceeding with a search or arrest, should not be penalized for an after-the-fact determination that the magistrate erroneously found probable cause existed. *United States v. Leon*, 104 S. Ct. at 3420. If the officer fails in this duty by presenting evidence which is false or by recklessly disregarding the truth, liability may be appropriate. However, it is the duty of the magistrate, not the police officer, to determine whether the quantum of evidence is sufficient to establish probable cause. The First Circuit's decision transfers this duty to the police officer, and the decision should therefore be reversed.

II. THE COURT OF APPEALS' DECISION IS INCONSISTENT WITH THE POLICIES UNDERLYING QUALIFIED IMMUNITY.

As this Court recognized in *Harlow v. Fitzgerald*, 457 U.S. 800, 813 (1982): "The resolution of immunity questions inherently requires a balance between the evils inevitable in any available alternative." On the one hand, immunity may be undesirable because "an action for damages may offer the only realistic avenue for vindication of constitutional guarantees." 457 U.S. at 814. On the other hand, immunity may be desirable in order to mitigate the social costs of unlimited liability. Such costs include the expenses of litigation, the "diversion of official energy from pressing public issues," discouraging competent citizens from accepting public office, and the danger of excessively deterring officials from enthusiastically exercising their duties. *Id.* The application of these policies to the instant matter suggests that the First Circuit's decision should be reversed.

As this Court and the First Circuit have recognized, it is not desirable to leave citizens without a remedy when constitutional rights are at issue. The First Circuit assumes such will be the result if police officers are insulated by a magistrate's decision in the circumstances of this case. 748 F.2d at 720. However, the First Circuit's conclusion is based on an overly narrow interpretation of "remedy." As this Court has recently recognized, the existence of remedies outside of 42 U.S.C. § 1983 may suffice even when such remedies "may not provide the respondent with all the relief which may have been available if he could have proceeded under § 1983." *Parratt v. Taylor*, 451 U.S. 527, 544 (1981). *Accord Hudson v. Palmer*, 104 S. Ct. 3194 (1984).

In the present case, remedies are available which mitigate the deleterious effects of limiting the § 1983 remedy. First, liability is still possible under § 1983 if the officer obtains a warrant based on knowing or reckless falsity. Second, the affidavit is subject to review by the magistrate, which as this Court has recognized, cannot be presumed ineffective. *United States v. Leon*, 104 S. Ct. 3418-19. Third, as the facts of the instant matter demonstrate, the criminal proceeding will be terminated if there is a subsequent determination of no probable cause. *See also United States v. Leon, supra* (exclusionary rule). Finally, state tort remedies may be available in appropriate circumstances.[1]

Amici recognize that not all of the above-listed remedies constitute damage remedies equivalent to that provided by § 1983. However, when the availability of at least some remedies is considered with the strong policies favoring the granting of immunity, it is evident that immunity is desirable here.

The social costs of excessive litigation in the circumstances of the instant case are apparent. In particular, society must be concerned with the possibility of excessive deterrence. The First Circuit posits that its rule will not chill officers in the exercise of their duty but will promote "the rule of law." 748 F.2d at 719. However, as the Court has recognized,

> '[o]nce the warrant issues, there is literally nothing more the policeman can do in seeking to comply with the law.' . . . Penalizing the officer for the magistrate's error, rather than his own, cannot logically contribute to the deterrence of Fourth Amendment violations.

United States v. Leon, 104 S. Ct. at 3420 (citation and footnote omitted). Indeed, the fear of personal liability is likely

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[1] Such remedies may include actions for false imprisonment, malicious prosecution, invasion of privacy, and intentional infliction of emotional distress.

to create excessive deterrence by making police officers reluctant to apply for warrants absent an airtight case, and by encouraging officers to distort their presentation of evidence in order to protect themselves. *Cf. Briscoe v. LaHue*, 460 U.S. 325, 333 (1983) (absolute immunity for police witnesses). Contrary to the First Circuit's conclusion, the rule of law will not be furthered if dedicated officers are subject to "the risk of monetary liability for a misstep while endeavoring to enforce the law." *United States v. Leon*, 104 S. Ct. at 3454, n.28 (Stevens, J., dissenting).

In addition, concern must be expressed regarding the time and energy which litigation requires and which directly subtracts from a public official's ability to fulfill his duties.

> [E]ven the processing of a complaint that is dismissed before trial consumes a considerable amount of time and resources.
>
> . . . To some degree, the individual's burden might be alleviated by the government's provision of counsel, but a case that goes to trial always imposes significant emotional and other costs on every party litigant.

Briscoe v. LaHue, 460 U.S. at 343-4 (footnote omitted). The Court has recognized the severity of this problem and modified the qualified immunity standard in response. *Harlow v. Fitzgerald, supra.* In *Harlow*, the Court particularly noted the "special costs" of the subjective test formerly applied in qualified immunity analysis:

> Judicial inquiry into subjective motivation . . . may entail broad-ranging discovery and the deposing of numerous persons, including an official's professional colleagues. Inquiries of this kind can be peculiarly disruptive of effective government.

457 U.S. at 817 (footnotes omitted).

The objective standard set forth in *Harlow* anticipates that the court will determine the reasonableness of an official's conduct (and thus his entitlement to qualified immunity) "by reference to clearly established law." 457 U.S. at 818. In other words, the analysis is to be a legal one. Unfortunately, the *Harlow* standard is almost impossible to apply in Fourth Amendment cases involving probable cause because such cases, by their very nature, must be decided on a case-by-case basis. The facts of each situation are so individual that only rarely will existing case law clearly establish that particular conduct is prohibited. As the Court noted in *Illinois v. Gates*:

> [P]robable cause is a fluid concept—turning on the assessment of probabilities in particular factual contexts—not readily, or even usefully, reduced to a neat set of legal rules.

462 U.S. at 232. *See also United States v. Leon*, 104 S. Ct. at 3417 ("reasonable minds frequently may differ on the question whether a particular affidavit establishes probable cause"). *Cf. Hudson v. Palmer*, 104 S. Ct. at 3206 (O'Connor, J., concurring) ("the Fourth Amendment 'reasonableness' determination is generally conducted on a case-by-case basis"). Because of the difficulties of making such a determination in warrant cases, there is a particular need for an objective rule of law to guide the courts and officers in their conduct. *See United States v. Ross*, 456 U.S. at 825 (Blackmun, J., concurring).

The First Circuit states that its standard is an objective standard consistent with *Harlow*. And, indeed, the First Circuit does adopt the language of *Harlow* in its opinion. However, as a practical matter, the First Circuit's test of "constitutional negligence" perpetuates that which *Harlow* was designed to correct—the difficulty of a case-by-case analysis

requiring considerable discovery and, ultimately, trial. For it is only by extensive analysis of each individual case that it will be possible to determine whether an officer "should have known" that the facts recited in his affidavit did not constitute probable cause.

Petitioner, on the other hand, offers a truly objective rule in this case by placing the responsibility for probable cause determinations squarely with the magistrate and removing the specter of liability for police officers in such circumstances unless the officer obtained the warrant with knowing or reckless falsity. This rule is a logical extension of recent developments in Fourth Amendment analysis where the Court has stated that:

> '[S]earches pursuant to a warrant will rarely require any deep inquiry into reasonableness,' *Illinois v. Gates*, 462 U.S. at ——, 103 S. Ct. at 2347 (White, J., concurring in the judgment), for 'a warrant issued by a magistrate normally suffices to establish' that a law enforcement officer has 'acted in good faith conducting the search.' *United States v. Ross*, 456 U.S. 798, 823, n.32, 102 S. Ct. 2157, 2172, n.32, 72 L.Ed.2d 572 (1982).

United States v. Leon, 104 S. Ct. at 3421. In contrast with the First Circuit's holding, the rule is completely consistent with the policies underlying qualified immunity. It will provide officers with clear guidance for conduct and will allow them to direct their energies where they should be directed, to protecting the public. In addition, placing responsibility for probable cause determinations with the magistrate puts that decision in the hands of officials who are neutral, detached and trained in the law. See discussion *supra* at p. 4. The result will be exactly what the First Circuit desires, "the exercise of police power *within* the law." 748 F.2d at 719 (emphasis in original).

CONCLUSION

The instant matter provides the Court with an opportunity to address the relationship between a police officer's duty to enforce the law and his potential exposure for civil liability for executing that duty. Recent cases regarding both law enforcement and civil liability have left unanswered the question raised in this case. However, the policies underlying those cases suggest that an officer who believes the facts in his affidavit to be true, and submits the affidavit to a neutral and detached magistrate, should not be liable for civil damages when it is subsequently determined that the warrant issued by the magistrate was not supported by probable cause. For these reasons, amici curiae join the Petitioners in urging the Court to reverse the decision of the Court of Appeals.

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Respectfully submitted,

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